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No. 86-873

In the Supreme Court of the United States

OCTOBER TERM, 1986

ANTONIO MAZZA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals was correct in finding the admission of certain evidence to be harmless error.

2. Whether other alleged errors deprived petitioner of a fair trial.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-82) is reported at 792 F.2d 1210.

JURISDICTION

The judgment of the court of appeals was entered on June 3, 1986. A petition for rehearing was denied on July 24, 1986. The petition for a writ of certiorari was filed on September 19, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Massachusetts, petitioner was convicted of conspiracy to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846. He was sentenced to 12 years' imprisonment. The court of appeals affirmed (Pet. App. 1-82).[1]

1. The evidence at trial is summarized in the opinion below (Pet. App. 2-12). Briefly, it showed that in August and September 1984 petitioner and co-defendant Anthony DeCologero sought to obtain a regular supply of cocaine from one Armand Barrasso. Barrasso was a drug dealer who had previously agreed to become a DEA informant. Tape recordings of telephone conversations between Barrasso and petitioner or DeCologero, as well as recordings made by Barrasso of meetings with petitioner and DeCologero, were played to the jury. The recordings and other evidence showed that the defendants engaged in repeated discussions of a proposed cocaine transaction. The discussions culminated on September 20, when petitioner and DeCologero met twice at a Boston hotel with Barrasso and an undercover DEA agent, who was introduced to petitioner as Barrasso's "Florida source." In the first meeting, the "source" announced that he had "two kilos of cocaine" and that he "understood [petitioner and DeCologero] wanted to do some business" (*id.* at 10). Petitioner noted

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[1] Petitioner's sentence is to be served following a sentence of life imprisonment imposed after his conviction in state court for murder. See Pet. 7 n.2.

Co-defendant Anthony DeCologero was also convicted of conspiracy and sentenced to 12 years' imprisonment. The court of appeals affirmed his conviction as well. He has not sought review in this Court.

that he was "in organized crime up here," and he and DeCologero agreed to return later with the purchase money (*ibid.*). Several hours later, at the second meeting, DeCologero showed the undercover agent a canvas bag filled with cash. Petitioner and DeCologero were thereupon arrested.

2. At trial, DeCologero presented an entrapment defense. He testified that he had had no prior dealings in narcotics and that Barrasso had pressured him to engage in a cocaine deal. Petitioner did not testify at trial, but he also claimed that Barrasso had entrapped him.

The two DEA agents who supervised Barrasso's activities recounted what Barrasso had told them about his conversations with petitioner and DeCologero. Although the defense objected, the district court allowed the agents' testimony on the ground that the evidence was admitted not for the truth of the matters asserted but to establish the "background" for the investigation (2 Tr. 8), "to show that [the agents] acted in a certain manner" (2 Tr. 10), and to show "the basis for the actions taken by the government" (1 Tr. 20). See also 1 Tr. 21, 24-25; 2 Tr. 123-124; Pet. App. 14. The court gave repeated and comprehensive limiting instructions on the proper use of the evidence. Pet. App. 11-14.

3. The court of appeals affirmed (Pet. App. 1-82). It found that admission of the DEA agents' testimony "technically" was not hearsay, since it was admitted for a purpose other than to prove the truth of the matters asserted by Barrasso (*id.* at 13-14). The court held, however, that the evidence should have been excluded under Fed. R. Evid. 403, because its probative value was outweighed by the danger of unfair prejudice (Pet. App. 14-21). The risk that the

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jury would wrongfully consider the evidence for the truth was substantial, the court said, and the need for the agents' testimony was not (*id.* at 14-15). Nonetheless, the court concluded that the error in admitting the evidence was harmless (*id.* at 21-53). After reviewing the record, the court characterized the government's case as "overwhelmingly strong" (*id.* at 23). The court then "located each instance in which [the agents] brought potentially prejudicial out-of-court statements to the jury's attention, and compared this with testimony from other, corroborative evidence that was properly admitted" (*id.* at 22-23 (citation omitted)). See *id.* at 23-46. In connection with three of these instances, the court determined that it was "virtually certain" that the agents' improper testimony did not affect the jury's judgment (*id.* at 46). As to the four remaining instances, the court found it "highly probable" that the testimony did not affect the finding of guilt (*id.* at 47). The tape recordings and other independent evidence presented an overwhelming case, the court concluded, and the challenged testimony could not have affected petitioner's asserted entrapment defense, "given the remaining evidence of [petitioner's] actions, intent, and predisposition" (*id.* at 47-48).

The court of appeals also considered and rejected numerous other claims by petitioner, including assertions that the district court erred in certain evidentiary rulings, in its instructions to the jury, and in the restrictions it placed on petitioner's cross-examination of Barrasso (Pet. App. 53-82).

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ARGUMENT

1. Petitioner's principal contention is that the court of appeals used an incorrect harmless error analysis and that its analysis is in conflict with the standards applied by other circuits.

a. The court of appeals used the correct standard in determining that the admission of the agents' testimony was harmless error. Petitioner appears to acknowledge (Pet. 9-10) that the proper test for assessing the error in this case is the one set out in *Kotteakos* v. *United States*, 328 U.S. 750, 763-765 (1946). His claim is that the court of appeals did not follow *Kotteakos*, because it "chose to strip the error from the whole" and because it emphasized the strength of the evidence against him (Pet. 9-14). This claim is baseless. The court of appeals explicitly followed *Kotteakos*, focusing on "the likely impact of the error on the minds of the jurors" (Pet. App. 21-22) and quoting at the outset the same key passage from *Kotteakos* that petitioner relies on: "[W]e have asked ourselves whether we can say, 'with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the [jurors'] judgment was not substantially swayed by the error'" (*Kotteakos*, 328 U.S. at 765, quoted at Pet. App. 22). Having set out that standard, the court of appeals then followed it, carefully reviewing the entire record and scrutinizing with special care the evidence that was erroneously admitted. The court concluded that it was "virtually certain" in three instances and that it was "highly probable" in four others that the evidence did not affect the jury's judgment (Pet. App. 46-47).

Nothing in *Kotteakos* precludes a court from weighing the strength of the government's evidence

in determining whether any error is harmless. Indeed, *Kotteakos* suggests the contrary, especially in a case like this one in which the disputed evidence is cumulative (328 U.S. at 763). See also *United States* v. *Lane*, No. 84-744 (Jan. 27, 1986), slip op. 12 n.13. There is no reason to suppose that the court of appeals made the strength of the evidence its "sole criteri[on]" (see Pet. 13); rather, that factor was simply part of the court's determination of whether the erroneous evidence "affect[ed] the jury's judgment" (Pet. App. 46-47; *Kotteakos*, 328 U.S. at 765).[2]

Petitioner is also incorrect in his contention (Pet. 14) that the court of appeals' analysis is inconsistent with the concurring and dissenting opinions in *United States* v. *Lane*, *supra*. Justice Brennan's opinion in *Lane* cited *Kotteakos* for the proposition that an "error is harmless unless it had 'substantial influence' on the outcome or leaves one in 'grave doubt' as to whether it had such effect" (slip op. 8). Justice Stevens' opinion noted that *Kotteakos* established that " '[t]he inquiry . . . is . . . whether the error had substantial influence' " (slip op. 8 n.11; see also *id.* at 13 n.20). Neither characterization of *Kotteakos* is in any way inconsistent with the analysis of the court of appeals, and both opinions acknowledge that a reviewing court can properly consider the strength of the government's case, to the extent that it bears on the ultimate question—the ex-

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[2] Petitioner's contention that the evidence erroneously admitted was considered in a vacuum and "stripped from the whole" is belied by the court of appeals' explicit recognition that "Barrasso's later, admissible testimony offers only some, not total, corroboration, since the agents' improper testimony arguably preconditioned the jurors to overvalue Barrasso's credibility" (Pet. App. 23).

tent to which the erroneously admitted evidence influenced the jury. Slip op. 12 (opinion of Brennan, J.) ("the existence of overwhelming evidence is relevant to determining the 'effect the error had or reasonably may be taken to have had upon the jury's decision'" (quoting *Kotteakos*, 328 U.S. at 764)); *Lane*, slip op. 12-13 (opinion of Stevens, J.). While both separate opinions in *Lane* emphasized that reviewing courts must be cautious in their review of the evidence before determining that error is harmless (slip op. 11-12 (opinion of Brennan, J.); slip op. 12-13 (opinion of Stevens, J.)), the court of appeals' thorough analysis of the effect of the errors in this case satisfied that standard.[3]

b. Petitioner is also incorrect in his assertion (Pet. 15-19) that the court of appeals' harmless error analysis conflicts with that of the Third and Fifth Circuits. Neither the Third nor the Fifth Circuit disputes that *Kotteakos* is the proper standard for reviewing non-constitutional error.[4] The claim

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[3] The petition (at 8) states that the court of appeals erred by applying Judge Traynor's view of harmless error rather than the standard adopted in *Kotteakos*. Judge Traynor suggested that "[u]nless the appellate court believes it highly probable that the error did not affect the judgment, it should reverse." R. Traynor, *The Riddle of Harmless Error* 35 (1970). As one commentator has pointed out: "If this is more than a refining of, or a gloss on the *Kotteakos* test, it seems to be in the direction of making the standard for harmless error more rigorous so that it approaches the test used for errors of a constitutional dimension." 3A C. Wright, *Federal Practice and Procedure* § 854, at 302 (1982). The court's use of Judge Traynor's formulation of the harmless error standard therefore could not have prejudiced petitioner.

[4] The harmless error analysis in this case is clearly governed by *Kotteakos* and not *Chapman* v. *California*, 386 U.S. 18 (1967), since the court of appeals found no constitutional

of conflict therefore reduces to focusing on different articulations of the *Kotteakos* test. The differences in the language used to describe the *Kotteakos* test in particular cases do not represent a significant difference in approach. Thus, the Third Circuit, after finding the *Kotteakos* test to be applicable to an evidentiary error similar to the one in this case, found the error harmless because there was no "reasonable possibility" that the error contributed to the conviction. *United States* v. *Zarintash*, 736 F.2d 66, 72 (3d Cir. 1984). And in *United States* v. *Parry*, 649 F.2d 292, 296 (5th Cir. 1981), the Fifth Circuit found an evidentiary error to be prejudicial under *Kotteakos* because the court was "unable to say with fair assurance that the jury was not substantially influenced by the error." Neither standard is discernibly different from the standard set out in *Kotteakos* and applied by the court of appeals in this case.[6]

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error, but only a violation of Fed. R. Evid. 403. Petitioner's reliance on *United States* v. *Martinez*, 588 F.2d 495, 499 (5th Cir. 1979), is misplaced, since the court in that case did not hold that the *Chapman* test is applicable to nonconstitutional errors, but only stated—without discussion of the proper standard—that the error in that case was "harmless beyond any reasonable doubt." That passing observation did not commit the Fifth Circuit to applying the *Chapman* test to all hearsay errors; it simply established that the error in the *Martinez* case was harmless under any standard. Fifth Circuit decisions before and after *Martinez* make clear that, for nonconstitutional errors, *Kotteakos* governs. See *United States* v. *Phillips*, 664 F.2d 971, 1027 n.84 (1981), cert. denied, 457 U.S. 1136 and 459 U.S. 906 (1982); *United States* v. *Opager*, 589 F.2d 799, 803 n.9 (1979); *United States* v. *Rodriguez*, 573 F.2d 330, 333 (1978).

[6] See 1 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 103[06], at 103-68 (1986) (footnote omitted): "It is hard

2. Petitioner also asserts in passing that there were other errors at trial that rendered his conviction unfair.

a. First, he suggests (Pet. 6) that Barrasso could not be effectively confronted or cross-examined.[6] In fact, however, Barrasso was subject to thorough cross-examination. The defense questioned him at length about his conduct and conversations with petitioner and DeCologero during the investigation; his extensive history of cocaine trafficking; his failure to pay taxes on his narcotics income; the discovery of drugs and weapons during the search of his house; his plea agreement with the government; and his alleged bias against petitioner (Gov't C.A. Br. 23-24). At one point when petitioner objected to the limitations on his cross-examination, the district court pointed out that the "limited" cross-examination had lasted for 6 hours and 25 minutes, after a direct examination that had lasted only 2 hours and 35 minutes (8 Tr. 18). The court of appeals noted that the cross-examination covered 250 pages of the transcript (Pet. App. 80). The court of appeals correctly found that the district court had prohibited

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to discern from the cases whether the articulation of a particular test really matters. The appellate court will affirm, regardless of whether a high probability, more-probable-than-not, or reasonable possibility test is applied, when, after assessing a number of factors * * *, it does not have a serious doubt about the fairness of the trial on the outcome of the case."

[6] Petitioner also suggests there that the *agents* could not be effectively confronted or cross-examined either, but he apparently did not make that claim below (see Pet. C.A. Br. 17, 39-46; Pet. App. 80-81). In any event, the court did not improperly restrict petitioner's right to cross-examine the agents.

only "repetitive, argumentative, and immaterial questions," and that petitioner's ability to impeach Barrasso was not impaired (*ibid.*).

b. Petitioner also asserts (Pet. 20) that the district court erroneously admitted evidence of his alleged involvement in a murder. In fact, no such evidence was admitted. Petitioner apparently refers to the trial court's ruling that if petitioner testified, he could be impeached with his recent state murder conviction (see Pet. App. 55). As the court of appeals found (*id.* at 55-56), however, this Court's decision in *Luce* v. *United States*, 469 U.S. 38 (1984), makes clear that petitioner waived that claim by declining to testify.

c. Petitioner's remaining claim is that the trial court erroneously failed to respond to a jury request for supplemental instructions (Pet. 20). That claim was also properly rejected by the court of appeals (Pet. App. 78-80). Two hours after deliberations had commenced, the jury asked to "rehear the judge's instructions" (*id.* at 78). After conferring with all counsel, the court suggested that, since the entire charge had taken 30 minutes to relate, the jurors might wish to focus on the particular portions of the charge that they wished to hear again. The court made clear to the jury, however, that "[i]f you want to rehear them over again, I will, of course, honor that request" (*id.* at 79). Petitioner did not object at any time that the court's response to this request by the jury was improper (*id.* at 79-80), and the jury did not renew its request. Under these circumstances, the trial court's response was not, as petitioner claims, a "failure to answer the jury's request" (Pet. 20).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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